

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DANIEL MORALES,
:
Plaintiff, : REPORT & RECOMMENDATION
:
-against- : 98 Civ. 5013 (JSR) (MHD)
:
DR. MACKALM, et al., :
:
Defendants. :
-----x

TO THE HONORABLE JED S. RAKOFF, U.S.D.J.:

Plaintiff Daniel Morales commenced this pro se lawsuit in 1998, seeking relief for a variety of constitutional torts allegedly perpetrated by staff members of the New York State prison in which plaintiff was confined. We now recommend dismissal of the complaint under Federal Rule of Civil Procedure 25(a), following plaintiff's death.

The lawsuit was dismissed by the District Court for failure to exhaust administrative remedies and in part for failure to state a claim, a decision vacated in part by the Second Circuit in a decision issued in 2002. Morales v. Mackalm, 278 F.3d 126 (2d Cir. 2002). That decision remained in a state of suspended animation, however, because of the pendency of a motion by defendants to recall the mandate, an application that was not resolved until issuance on January 26, 2006 of an order denying the motion in part, and remanding the case to the District Court.

In the wake of the remand we conducted a telephone conference with plaintiff and defendants' counsel, on February 17, 2006, at which we directed plaintiff, in accordance with the Second Circuit's decision, to submit an amended complaint. (Order dated Feb. 17, 2006). That did not occur, but at plaintiff's request we extended his deadline to do so to May 24, 2006. (Order dated April 24, 2006). When that deadline passed without further action, defendants' attorney discovered that plaintiff had died on May 11, 2006, and so advised the Court. (June 5, 2006 Letter to Ct. from Ass't Att'y Gen. Jeb Harben).

At the instruction of the Court (Order dated September 19, 2006), defendants' counsel filed a suggestion of death under Rule 25(a) and served it on plaintiff's sister, Ms. Rebecca Morales, who was apparently plaintiff's nearest surviving family member.¹ In addition, the Court sent a letter to Ms. Morales on September 19, 2006, explaining that if she wished to pursue the case on behalf of plaintiff's estate, she must arrange for an attorney to enter an appearance and apply for an order substituting her as a party in place of her late brother. We also advised her that if she wished to pursue the matter she would have to act within ninety days after the filing of the suggestion of death.

¹This information was supplied by the prison authorities.

Because the original suggestion of death had contained an error, defendants' attorney served and filed a corrected suggestion of death on October 5, 2006. Since that time more than ninety days has passed, and we have received no communication from Ms. Morales and no motion for substitution. Under the circumstances, we recommend that the complaint be dismissed, pursuant to Federal Rule of Civil Procedure 25(a)(1).

Pursuant to Rule 72 of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies to be delivered to the chambers of the Honorable Jed S. Rakoff, Room 1340, and to the chambers of the undersigned, Room 1670, 500 Pearl Street, New York, New York, 10007-1312. Failure to file timely objections may constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e); Thomas v. Arn, 474 U.S. 140, 150-52 (1985); DeLeon v. Strack, 234 F.3d 84, 86 (citing Small v. Sec'y of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989)).

Dated: New York, New York
January 11, 2007



MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE

Copies of the foregoing Report and Recommendation have been mailed today to:

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Ms. Rebecca Morales
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